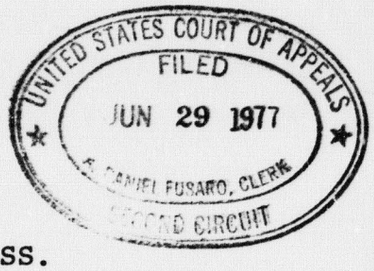

United States Court of Appeals
for the Second Circuit

APPELLEE'S BRIEF

77-7204

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

---X

GABINO ORTIZ,

Plaintiff,

-against-

NEW YORK PROPERTY UNDERWRITING ASS.
FAIR PLAN INSURANCE,

Defendant.

---X

UNITED STATES COURT OF APPEALS
FILED
JUN 29 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

B p/s

DEFENDANT-APPELLEE'S BRIEF

MARK E. ABRAMS
ALAN JAY MARTIN
Of Counsel

ABRAMS & MARTIN, P.C.
92 FULTON STREET
NEW YORK, N.Y. 10038

DI-12,569

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

--X

GABINO ORTIZ,

Plaintiff,

-against-

NEW YORK PROPERTY UNDERWRITING ASS.
FAIR PLAN INSURANCE,

Defendant.

--X

DEFENDANT-APPELLEE'S BRIEF

Plaintiff-Appellant appeals from an Order of the United States District Court which granted a motion to dismiss the complaint based on lack of diversity jurisdiction which had been made by the Defendant-Appellee.

Defendant-Appellee attaches hereto and incorporates as part of its Brief photostatic copies of the moving papers, affirmation and memorandum of law from the Court below as Exhibits 1, 2 and 3.

It is clear from Plaintiff-Appellant's Brief that no new or further evidence has been tendered to refute the determination of the United States District Court that lack of diversity jurisdiction does not exist. Further, an appellate brief regarding a jurisdictional question is not the proper vehicle in which to argue the facts of litigation.

The thought that Plaintiff-Appellant carries in his mind that the State Court will not dispense justice and that it is less economical than the Federal Court is not sufficient grounds to confer jurisdiction or to reverse a determination of the lower Court.

Respectfully submitted,

ABRAMS & MARTIN, P.C.
Attorneys for Defendant

MARK E. ABRAMS
ALAN JAY MARTIN
Of Counsel

EXHIBIT 1

DI-12,569

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X

GABINO ORTIZ,

Plaintiff,

-against-

NEW YORK PROPERTY UNDERWRITING ASS.
FAIR PLAN INSURANCE,

Defendant.

--X

NOTICE OF MOTION
TO DISMISS

Index No: 76 Civ. 4459

JUDGE GAGLIARDI

S I R :

PLEASE TAKE NOTICE that the defendant moves pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure for an Order dismissing the cause of action contained in plaintiff's complaint upon the ground that the Court is without jurisdiction and the requisite diversity of citizenship is not shown to exist.

PLEASE TAKE FURTHER NOTICE that the foregoing motion will be heard before Hon. LEE GAGLIARDI, District Court Judge in the United States Courthouse, located at Foley Square, New York, New York, on the 7th day of December, 1976 at 4:00 in the afternoon of that day or as soon thereafter as counsel can be heard.

Dated: New York, New York
November 22, 1976

Yours, etc.,

ABRAMS & MARTIN, P.C.
Attorneys for Defendant
Office and P.O. Address
92 Fulton Street
New York, NY 10038
(212) 577-0270

EXHIBIT 2

DI-12,569

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------------X

GABINO ORTIZ,

Plaintiff,

-against-

AFFIRMATION

NEW YORK PROPERTY UNDERWRITING ASS.
FAIR PLAN INSURANCE,

Defendant.

--------------------------------------X

MARK E. ABRAMS, an attorney at law, associated with ABRAMS & MARTIN, P.C., attorneys for the defendant, affirms the following statement under the penalty of perjury:

The instant motion requests dismissal of the summons and complaint served by plaintiff in that there is a lack of diverity of citizenship which makes this action without the jurisdiction of the Court.

In paragraph 1 of the complaint, plaintiff states that "For a period of over twenty years immediately preceding the commencement of this action, plaintiff was in continuous residence in the State of New York and continue to the present time." Clearly, plaintiff is a New York State resident and domiciliary.

Defendant, NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION, sued herein as NEW YORK PROPERTY

UNDERWRITING ASS. FAIR PLAN INSURANCE, was and is an association created by Article 17-b of the Insurance Law of the State of New York and was authorized to issue policies of insurance including the ones sued upon herein and maintained its offices at 110 William Street, New York, New York 10038. Further, both policies referred to by the plaintiff in the complaint were issued in the State of New York through insurance brokers licensed by the State of New York.

As to the losses sued upon, both occurred at the insured building located at 933 East 167th Street, Bronx, New York.

Clearly, this is a controversy between New York residents concerning insurance policies issued in the State of New York covering a building located also in the State of New York.

WHEREFORE, defendant respectfully requests that the instant motion requesting an order of dismissal for lack of diversity of citizenship be granted together with such other, further, and different relief as to this Court may seem just and proper.

Dated: New York, New York
November 21, 1976

MARK E. ABRAMS

EXHIBIT 3

DI-12,569

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

GABINO ORTIZ,

Plaintiff,

-against-

NEW YORK PROPERTY UNDERWRITING ASS.
FAIR PLAN INSURANCE,

Defendant.

---X

STATEMENT OF FACTS

Defendant, authorized to issue fire insurance policies in the State of New York by Article 17-b of the Insurance Law, issued two policies of insurance bearing numbers 503801-5 and 522033-5, covering premises 933 East 167th Street, Bronx, New York. These policies were issued at the request of insurance brokers licensed by the State of New York, Insurance Department to a New York resident.

Plaintiff claims damage to the premises due to fire in the amount of $150,000 which is the total of both policies of insurance.

POINT I

THIS COURT DOES NOT HAVE JURISDICTION OVER THE SUBJECT MATTER OF THE LAWSUIT DUE TO LACK OF DIVERSITY OF CITIZENSHIP OF THE PARTIES.

The concept of diversity jurisdiction was based on an effort to afford out-of-state litigants an impartial forum on matters not involving federal issues.

It is evident from the complaint that no diversity of citizenship was alleged and that the allegations, broadly read, do not charge any violation of a federal statute. In reality, this matter is one of adjusting insurance losses and the proper forum is the Courts of the State of New York.

CONCLUSION

RULE 12 (b) (1) REQUIRES DISMISSAL OF A COMPLAINT WHEN THE COURT LACKS JURISDICTION OVER THE SUBJECT MATTER DUE TO LACK OF DIVERSITY OF CITIZENSHIP.

Respectfully submitted,

ABRAMS & MARTIN, P.C.
Attorneys for Defendant

MARK E. ABRAMS
HENRY H. ABRAMS
Of Counsel

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

---X

GABINO ORTIZ,

Plaintiff,

-against-

DOCKET NO. 77-7204

NEW YORK PROPERTY UNDERWRITING ASS.
FAIR PLAN INSURANCE,

Defendant.

---X

STATE OF NEW YORK)
)s.s.:
COUNTY OF NEW YORK)

LOIS FRIEDMAN, being duly sworn, deposes and says:

I am not a party to the within action; I am over 18 years of age; I reside in the Bronx, New York.

I served the within Defendant-Appellee's Brief by regular and certified mail pursuant to Rule 25d F.R.A.P., on the 30th day of June, 1977 upon:

GABINO ORTIZ
3785 Broadway
Room 11[illegible]
New York[illegible] NY 10032

the address designated by said party for that purpose by depositing a true copy of same, enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: New York, New York
June 30, 1977

LOIS FRIEDMAN

Sworn to before me
this 30th day of June, 1977

Mark E. Abrams

MARK E. ABRAMS
Notary Public, State of New York
No. 31-6007610
Qualified in New York County
Commission Expires March 30, 1978